

April 23 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA**IN THE SUPREME COURT OF THE STATE OF MONTANA****Supreme Court No. DA 09-0682**

JEANETTE DIAZ, LEAH HOFFMANN-
BERNHARDT, RACHEL LAUDON,
individually and on behalf of others
similarly situated,

Plaintiffs/Appellants,

vs.

BLUE CROSS AND BLUE SHIELD OF
MONTANA, NEW WEST HEALTH
SERVICES, MONTANA COMPREHENSIVE
HEALTH ASSOCIATION, STATE OF
MONTANA, AND JOHN DOES 1-100,

Defendants/Appellees.

Lower Court Cause
No. BDV 2008-956
Honorable Jeffrey Sherlock

FILED

APR 23 2010

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

**APPELLANTS' RESPONSE TO BLUE CROSS
BLUE SHIELD MONTANA'S MOTION TO STRIKE**

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Pursuant to Mont. R. App. P. 16 (2), the Appellants respond to the Motion to Strike as follows:

To apprise the Court of this situation in related lawsuits in Montana courts, the Appellants included portions of the pleadings from those cases in the Appendix, requesting that this Court take judicial notice pursuant to Montan Rules of Evidence 201-202. BCBSMT's objections to these pleadings lack merit.

Appellate courts routinely take judicial notice of pleadings. As recently reviewed in *Worthy v. Hartley*, 2010 W.L. 1339215, 3 (E.D. Cal. 2010):

The record of state court proceeding is a source whose accuracy cannot reasonably be questioned, and judicial notice may be taken of court records. *Mullis v. United States Bank*, 828 F.2d 1385, 1388 n. 9 (9th Cir. 1987); *Valerio v. Boise Cascade*, 80 F.R.D. 626, 635 n. 1 (N.D. Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir.); *see also Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989); *Rodic v. Thistle Down Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980).

A review of the cases citing in *Worthy, supra*, shows why this Court can take judicial notice of the pleadings in Appellants' Appendices. *Mullis, supra*, states pleadings can be judicially noticed on appeal under Fed. R. Evid. 201 (f) and therefore, an objection to such documents on appeal "is not well taken." *Colonial Penn Ins. Co., supra* at 1239-1240 states:

Pursuant to Fed. R. Evid. 201 (b)(2), "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of

accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” We note that “[t]he most frequent use of judicial notice of ascertainable facts is in *noticing the content of court records*.” 21 C. Wright & K. Graham, *Federal Practice & Procedure: Evidence*, § 5106 at 505 (1977). In addition, Fed. R. Evid. 201 (f) provides that “judicial notice may be taken at any stage of the proceedings” of such matter; thus, *an appellant court may take judicial notice of facts*. 10 J. Moore and H. Bendix, *Moore’s Federal Practice*, § 200.01 at II-3 (3d ed. 1988).

(Emphasis added.) Montana Rule of Evidence 201 is identical to the federal rules cited by the above cases. Montana Rule of Evidence 201 (f) states that “judicial notice may be taken at any state of the proceeding.” In addition, Mont. R. Evid. 202 indicates that “judicial notice of law” includes “records of any court of this state or of any court of record of the United States or any court of record of any state of the United States.”

The Montana cases cited by BCBSMT in its Motion to Strike are not applicable. None of them reference judicial notice and Mont. R. Evid. 201, *supra*. *State v. MacKinnon*, 1998 MT 78, ¶ 15, 288 Mont. 329, 957 P.2d 23, for instance, was an attempt by the litigants to supplement the record with additional evidence – not a request for the court to take judicial notice pursuant to Mont. R. Evid. 201 and 202. Moreover, the other cases cited by the defendant appear to be situations where affidavits were submitted to the court to establish evidence, which was not

presented in the court below. By contrast, the Appellants are simply asking the Court to take judicial notice of information within pleadings in the Montana state and federal court, which information is “not subject to reasonable dispute” or is “capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” Rule 201 (b), *supra*.

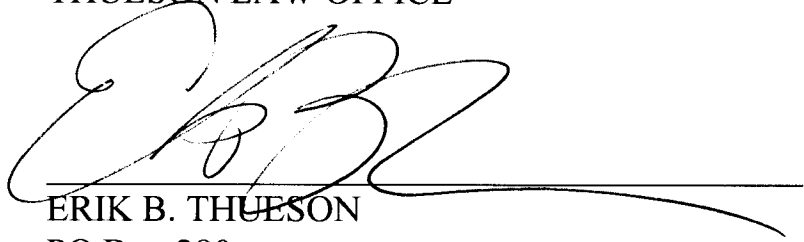
Finally, BCBSMT, itself, was sending pleadings from these related cases to the District Court in this case. On November 9, 2009, counsel for BCBSMT sent an email to the judge’s clerk, providing the Court with pleadings from the related cases in question. BCBSMT further relates how it had given the Court other pleadings “during [an] October 22 hearing.”

A copy of the email is attached. It is also submitted under Rule 201, *supra* for judicial notice since it is “capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” (I.e., BCBSMT is the source.) It demonstrates BCBSMT believed the pleadings in the related cases were relevant to decisions in the case now before this Court and therefore, is inconsistent with BCBSMT’s Motion to Strike.

For all of the above-stated reasons, BCBSMT’s Motion to Strike lacks merit and should be denied.

DATED this 23rd day of April, 2010.

THUESON LAW OFFICE

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ERIK B. THUESON

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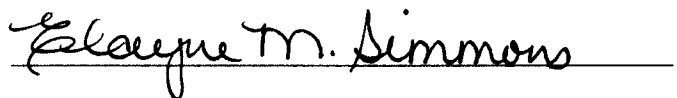
Attorney for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 (4), MCA, I hereby certify that the foregoing document is double spaced, proportionately spaced, Times New Roman typeface, and 14 point size and the word count calculated by WordPerfect contains **742** words, excluding the certificates of compliance and service.

DATED this 23rd day of April, 2010.

THUESON LAW OFFICE

A handwritten signature in black ink, appearing to read 'Elaine M. Simmons', is written over a horizontal line.

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of April, 2010, I served true and accurate copies of the foregoing document upon counsel of record by the following means:

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Attorney for BC/BS

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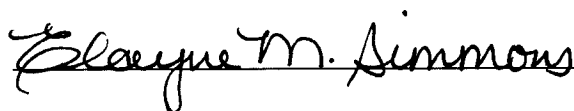
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Erik Thueson

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To: "Frankino, Steve" <SFrankino@mt.gov>
Cc: <rclukes@GARLINGTON.COM>; "Leo Ward" <leow@bkbh.com>; "Jackie Lenmark" <jtlenmark@kellerlawmt.com>; "Erik-work" <erik@thuesonlawoffice.com>; "Elayne" <elayne@thuesonlawoffice.com>; "Stefan Wall" <stefan@mlfpllc.com>; "Sean Slanger" <Sean_Slanger@bcbsmt.com>; "Greg G Gould" <Greg_Gould@bcbsmt.com>; "Jim Hunt" <jhunt@dhmlaw.com>
Sent: Monday, November 09, 2009 2:13 PM
Attach: 102909 Diaz Motion to Intervene Memo in Support.pdf; 110309 Brief in Support of Joint Motion for CC.pdf; 110309 Joint Brief in Support of PI Motion.pdf; 110309 Order of Recusal.pdf; 110309 Joint Motion for CC.pdf; 110309 Joint Motion for PI.pdf; 110309 Order Assigning Judge Haddon.pdf; 110609 Response to Motion to intervene.pdf; 110609 MCHA's Response Brief to Interventino Motion.pdf
Subject: Neary Recusal, Assignment, Intervention, Class Certification and Preliminary Injunction Briefs to Date Steve,

I promised Judge Sherlock during the October 22 hearing that I would keep him up to date on the Neary federal court proceeding. I've attached the most recent filings and orders in that case.

Thank you.

Mike

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4/23/2010